No. 09-293

In the Supreme Court of the United States

MODESTO OZUNA, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld under an abuse of discretion standard the district court's decision to reopen the suppression hearing to allow the government to present the testimony of a handwriting expert.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 561 F 3d 728. The orders of the district court (Pet. App. 31a-37a, 39a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2009 On June 17, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 3, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of more than five kilograms

of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 25 years of imprisonment, to be followed by five years of supervised release The court of appeals affirmed. Pet. App. 1a-22a.

1. On July 28, 2003, Drug Enforcement Agency (DEA) Special Agent Michael Lumpkin of McAllen, Texas, informed DEA agents in Chicago that Claudio Aguilar and Mario Garcia were part of an organization that transported cocaine from Texas to Chicago in tractor-trailers with Washington license plates registered to a company called "Ozuna's Express." Agent Lumpkin advised that Aguilar and Garcia were traveling to Chicago that day and were due to arrive at O'Hare Airport later that afternoon. DEA Special Agent Robert Glynn and other agents began surveillance at O'Hare Airport and placed Aguilar and Garcia under surveillance immediately upon their arrival at the airport. They saw the two men drive from the airport to a hotel. They noticed an Ozuna's Express tractor-trailer with Washington license plates sitting in the hotel parking lot. They then saw petitioner exit the hotel, enter the tractor-trailer, and drive off Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

Agents Glynn and Task Force officer William McKenna stopped petitioner's tractor-trailer. Agent Glynn asked petitioner if there was any contraband or stolen property in the trailer, and petitioner replied that the trailer was empty. Agent Glynn asked petitioner for his consent to search the tractor-trailer and petitioner agreed to a search. Petitioner told the agents that the key to the locked trailer was in the cab area, and the agents allowed him to retrieve the key from the cab. Agent Glynn again asked petitioner if he was sure that

there was nothing in the tractor-trailer, and petitioner stated that there were boxes of limes in the tractor-trailer. Petitioner unlocked and unlatched the trailer door. At this point, Agent Glynn retrieved a DEA consent-to-search form from his car and read it to petitioner. Petitioner signed the form, and Agents Glynn and McKenna signed as witness. Agents then searched the tractor-trailer and discovered approximately 200 kilograms of cocaine hidden among boxes of limes. Pet. App. 3a; Gov't C.A. Br. 4.

Petitioner was taken to a DEA office where he admitted that he knew that he was transporting illegal drugs and that he had transported drugs in the same manner in the past. Pet. App. 3a; Gov't C.A Br. 5. Petitioner agreed to cooperate against Aguilar and was allowed to return to Texas for that purpose. But after he was arrested again in August 2004, he was indicted on a charge of possession of more than five kilograms of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a

2. Petitioner moved to suppress the cocaine seized from the tractor-trailer. Petitioner claimed that he did not consent to the search of the tractor-trailer, asserting instead that the agents had used bolt cutters to cut the lock and had forcibly searched the truck. Mot. to Suppress 3 (Jan 12, 2005)

At a March 2, 2005, hearing conducted on the motion, Agent Glynn testified to the facts as described above The government introduced into evidence the signed consent-to-search form. Petitioner testified that, as he was driving a tractor-trailer loaded with mangoes and limes from Texas to Chicago on July 28, 2003, the agents cut him off, pointed a weapon at his head, demanded that he exit the tractor-trailer, and handcuffed him.

Petitioner maintained that he never consented to a search of the tractor-trailer, did not retrieve the keys from the cab or unlock the trailer, and did not sign the consent-to-search form. He denied any knowledge of the cocaine found in the tractor-trailer, and further denied telling the agents about his connection to Aguilar and Garcia or his involvement in transporting cocaine. Pet. App. 4a, 34a.

The district court granted petitioner's motion to suppress. Pet. App. 31a-37a. While concluding that the DEA agents had been justified in stopping the tractor-trailer, the court found that the government had failed to prove by a preponderance of the evidence that petitioner voluntarily consented to the search of the trailer. The court found that petitioner had lied when he testified that he did not tell the agents about his connection to Aguilar and Garcia and that he did not know that cocaine was in the tractor-trailer. *Id.* at 34a. The district court expressed doubt, however, concerning portions of Agent Glynn's testimony. The court pointed to Agent Glynn's testimony that the agents had allowed petitioner to retrieve the key to the tractor-trailer from the cab, observing that the agents would have faced serious risks in allowing petitioner to retrieve something from the cab without accompanying him or closely monitoring him. *Id* at 4a, 35a-36a. Furthermore, after comparing the signature on the consent form to petitioner's known signatures, the court was not convinced that petitioner had actually signed the form. *Id* at 35a-36a. On balance and in light of all the conflicting evidence, the district court held that it was "not persuaded by the greater weight of the evidence that the government's version of [events] is more likely true than not true." *Id.* at 35a.

3. After the hearing, the government submitted the consent-to-search form for fingerprint and handwriting analysis. While petitioner's fingerprints were not found on the form, a handwriting expert concluded that the signature on the form was indeed petitioner's. Pet App. 4a. On March 14, 2005, the government filed a motion to reconsider the suppression order, or alternatively to supplement the suppression hearing with testimony from its handwriting expert. The district court denied the motion for reconsideration, but requested a response from petitioner regarding the motion to supplement. Petitioner responded that the additional testimony would not relate to the issue of consent and that it would be prejudicial to reopen the hearing unless the court appointed an independent handwriting expert to review the evidence. The court granted the government's motion to supplement the suppression hearing with the additional testimony of a handwriting expert, and it granted petitioner leave to hire his own expert. Thereafter, the court conducted hearings to consider the testimony of both handwriting experts. *Id.* at 5a.

At the supplemental hearing, the government's handwriting expert testified that "he had concluded with his 'highest degree of confidence' that [petitioner] had signed the questioned document" and that "all dissimilarities between the questioned and known signatures were within the expected range of variation." Pet. App. 5a-6a.

The defense expert testified that several inconsistencies and "voids" within the pen strokes could indicate forgery. She explained, however, that she had not examined the document before it had been treated for fingerprint analysis, and that the chemical treatment or even a faulty pen could have resulted in the inconsistencies

Pet. App. 5a. She concluded that, after comparing the questioned signature with petitioner's known signatures, there were "indications" that petitioner may have signed the form, which she characterized as a "very weak opinion of authorship." *Ibid.*; see Gov't C A. Br. 9 (quoting the defense expert's opinion that there were "'no fundamental differences between the signature on the consent to search form' and the known signatures for [petitioner]").

The district court vacated its prior ruling and denied petitioner's motion to suppress. Pet. App. 39a-49a. The court stated that it afforded little weight to the government expert's conclusion that petitioner had signed the consent form. Rather, the court explained that both experts' testimony was useful in aiding the court's own evaluation of the signatures. *Id* at 40a; see *id* at 6a. The court stated that, after examining the questioned and known signatures, it had concluded by a preponderance of the evidence that petitioner had signed the consent-to-search form and that petitioner's contrary testimony was untruthful. The court accordingly found that Agent Glynn's testimony regarding the search was more likely true than not, and that petitioner had consented to the search. *Id* at 47a-48a Upon petitioner's motion, the court held another hearing to consider petitioner's additional evidence on the search, but the court ultimately denied petitioner's motion to reconsider its denial of the motion to suppress. *Id.* at 6a.

4. In August 2006, petitioner proceeded to trial, but a mistrial was declared when the jury was unable to reach a verdict. Pet. App. 6a-7a. Petitioner's retrial in November 2006 resulted in his conviction. He was sentenced to 25 years of imprisonment, to be followed by five years of supervised release *Id* at 7a-8a.

5 The court of appeals affirmed. Pet App. 1a-22a. The court rejected petitioner's argument that the district court erred in reopening the suppression hearing because the government could have subjected the document to handwriting analysis before the first hearing. *Id* at 9a-14a. Noting that it generally gave wide latitude to a district court's decision to reopen suppression hearings to consider newly obtained evidence, the court of appeals was unpersuaded by petitioner's argument that it should not do so when the party could have presented the evidence at the original hearing. The court pointed to the strong societal interest in the admission of all relevant evidence and noted that a defendant is only entitled to suppress evidence obtained in violation of the Constitution. The court adhered to circuit precedent holding that a district court remains free throughout trial to reconsider its previous order suppressing evidence, even absent government justification for such a request. *Id.* at 9a-10a. The court acknowledged that several circuits have adopted rules requiring the government to justify the reconsideration or reopening of suppression hearings, and it agreed that concerns about "fairness" and "piecemeal litigation" were valid. *Id* at 10a-12a. Nevertheless, the court of appeals concluded that a "more flexible approach" best protected society's interest in ensuring that all constitutionally obtained evidence is admitted and considered. *Id* at 12a At the same time, the court stressed, a district court remains "free to refuse to reopen the suppression hearing or to decline to consider the government's evidence if the government is wasting judicial resources or proceeding in a way that is unfair to the defendant." *Ibid*

The court of appeals found no abuse of the district court's discretion in this case. The court observed that

the handwriting comparison testimony "had a direct bearing on [petitioner's] credibility" because, if petitioner had signed the consent form, he had perjured himself at the previous hearing. Pet. App. 13a. The court found that "[t]his information would assist the district court in determining whose version of the search to believe, resulting in a more accurate ruling on the motion to suppress." *Ibid.* The court of appeals found no evidence that the government "was engaged in a deliberate strategy to proceed in a piecemeal fashion or otherwise waste judicial resources." *Ibid.* Instead, the court noted that the authenticity of petitioner's signature on the consent form was not clearly at issue until the first suppression hearing, when the district court expressed doubts about whether it was genuine. *Ibid.* Finally, the court of appeals stated that petitioner had not shown that he suffered any prejudice from the reopening of the suppression hearing because he had been allowed to call his own handwriting expert, and his counsel had extensively cross-examined the government's witness. *Id.* at 13a-14a.[1]

ARGUMENT

Petitioner contends (Pet. 9-23) that this Court should grant review to resolve a conflict among the courts of appeals over whether a litigant seeking to reopen a suppression hearing to permit it to introduce additional evi-

[1] The court also rejected petitioner's claim that the government's use of expert handwriting testimony did not meet the requirements of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), governing the admissibility of an expert witness's testimony (Pet. App. 14a-17a), as well as his challenge to various evidentiary rulings by the district court (*id.* at 17a-22a). Petitioner does not renew those challenges in this Court.

dence must justify its failure to submit such evidence at the original hearing. The courts of appeals all agree, however, that the decision to reopen a suppression hearing is left to the discretion of the district court, and any circuit conflict on this point is not of sufficient importance to warrant this Court's plenary review. Furthermore, this case would present a poor vehicle to resolve any such conflict because even under a justification requirement, the government's request to reopen the suppression hearing in this case was justified.

1. Petitioner contends (Pet. 11-15) that the court of appeals' decision in this case, which leaves the ultimate decision whether or not to reopen a suppression hearing to the sound discretion of the district court, conflicts with decisions of five other circuits To the contrary, there is no direct conflict among the courts of appeals. As an initial matter, *all* of the courts of appeals that have considered the issue agree that the decision to reopen a suppression hearing is left to the sound discretion of the district court and will not be disturbed on appeal absent an abuse of that discretion. See, *e g* , *In re Terrorist Bombings of United States Embassies in E Africa*, 552 F.3d 177, 196 (2d Cir. 2008), cert. denied, 129 S. Ct. 2765, 129 S. Ct. 2778 (2009), and No. 09-6231 (Jan. 11, 2010) (*In re Terrorist Bombings*); *United States* v. *Gill*, 513 F.3d 836, 846 (8th Cir.), cert denied, 129 S. Ct 750 (2008); *United States* v. *Simms*, 385 F.3d 1347, 1356 (11th Cir. 2004), cert denied, 544 U.S. 988 (2005); *United States* v *Carter*, 374 F.3d 399, 405 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005); *United States* v. *Coward*, 296 F.3d 176, 180 (3d Cir. 2002); *United States* v *Jordan*, 291 F.3d 1091, 1100 (9th Cir. 2002), vacated on other grounds, 543 U.S. 1103 (2005); *United States* v. *Wiseman*, 172 F.3d 1196, 1207-

1208 (10th Cir.), cert denied, 528 U S 889 (1999); *United States* v. *Dickerson*, 166 F 3d 667, 678 (4th Cir. 1999), rev'd on other grounds, 530 U.S. 428 (2000); *United States* v. *Hassan*, 83 F.3d 693, 696 (5th Cir. 1996). Moreover, courts of appeals agree that a number of factors may guide the district court's exercise of its discretion in deciding whether to reopen a suppression hearing See *In re Terrorist Bombings*, 552 F.3d at 196-197, *Carter*, 374 F.3d at 405-406; *Coward*, 296 F.3d at 181.

As the court of appeals correctly recognized in this case (Pet. App. 12a), a lack of justification is certainly one of those factors a district court may consider. See *In re Terrorist Bombings*, 552 F.3d at 196-197, *Hassan*, 83 F.3d at 696. Two of the cases petitioner cites as constituting part of the supposed circuit conflict did no more than recognize that a district court may exercise its discretion in this way. See *Carter*, 374 F.3d at 406 (holding that the district court did not abuse its discretion by denying the defendant's motion to reopen a suppression hearing without explaining why he failed to present the evidence at the initial hearing); *Dickerson*, 166 F.3d at 679 ("[T]he movant must provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress *before we will determine that a district court abused its discretion* in refusing to reconsider its suppression ruling.") (emphasis added); see also *ibid* ("[T]hat evidence was available to the movant prior to the suppression hearing does not, as a matter of law, defeat a motion for reconsideration in a criminal case "). These cases are therefore entirely consistent with the court of appeals' reasoning in this case.

Nor do the other cases cited by petitioner conflict with the decision of the court of appeals here. The Third Circuit in *United States* v *Kithcart*, 218 F.3d 213 (2000), considered the circumstances under which a district court may reopen a suppression hearing to receive additional proof *on remand* from an appellate court that vacated its prior suppression order. *Id* at 219-220. Analogizing the receipt of additional evidence on remand to the reopening of the government's case in chief after resting, the court stressed that "the district court's primary focus should be on whether the party opposing reopening would be prejudiced if reopening is permitted." *Id* at 220. As the Third Circuit later explained, "[a] critical factor in evaluating prejudice is the timing of the motion to reopen." *Coward*, 296 F.3d at 181. Because the Third Circuit's rule depends on the prejudice inherent in reopening a suppression hearing long after the original suppression has been ordered and other proceedings have taken place in the case, it has no application (and thus no conflict with) a case such as this one, in which a party moves to reopen less than two weeks after the suppression order, when the district court has never ceded its jurisdiction over the case [2]

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[2] The focus on the potential prejudice that would be suffered by the non-moving party also drove this Court's decision in *United States* v *Bayer*, 331 U S. 532 (1947) In *Bayer*, this Court affirmed a district court's refusal to allow a defendant to reopen the trial record to offer new evidence four hours into jury deliberations The Court ultimately concluded that the prejudice to the government and the distorted significance that would have been attributed to the evidence in the jury's eyes if the new evidence were admitted so late in the proceedings justified the district court's refusal Such circumstances are readily distinguishable from this case, and petitioner therefore is wrong (Pet 21-22) that the decision below conflicts with *Bayer*

For similar reasons, petitioner is incorrect that the court of appeals' reasoning conflicts with the D.C. Circuit's decision in *McRae* v *United States*, 420 F.2d 1283 (1969). Decided at a time when the government did not have authority to appeal a pretrial order suppressing evidence, *McRae* involved the unusual circumstances in which one district judge reconsidered a suppression order entered by a different district judge in the same case. See *id.* at 1285. After conducting a suppression hearing, the first district judge granted the defendant's motion to suppress and denied two motions to reconsider from the government. *Ibid* When trial began before another judge, the judge reconsidered the issues and ruled that the previously suppressed evidence would be admissible. In reversing, the court of appeals held that in those particular circumstances, the government "was obligated to advance stronger justification for relitigating the issue at trial." *Id* at 1288 The court then took pains to emphasize that it was "not attempt-[ing] to establish detailed standards governing when * * the Government may request a new hearing before the trial judge " *Id* at 1289; see *Hassan*, 83 F 3d at 696 n 3 (noting that it had "limited *McRae* to situations in which a judge at trial reverses a pretrial suppression ruling entered by a *different* judge"). *McRae* therefore did not purport to establish a bright-line rule, but rather confined its holding to the unique circumstances of that case, which in no way resemble the facts here.

Finally, the court of appeals' holding does not conflict with the Eleventh Circuit's decision in *United States* v *Thompson*, 710 F.2d 1500 (1983), cert. denied, 464 U.S. 1050 (1984). In *Thompson*, the district court denied the government's motion for reconsideration of a suppression order that pressed a legal argument that

the government had expressly *conceded* at the suppression hearing. *Id.* at 1504. In light of that concession and the government's lack of justification for failing to assert or develop the opposite argument at the original suppression hearing, the court of appeals agreed that the government had waived its right to assert that argument on appeal. *Ibid.*[3] *Thompson* therefore did not purport to address the circumstances under which a district court may reopen a suppression hearing to receive additional evidence.

In short, petitioner has not shown that the court of appeals' decision directly conflicts with any decision of this court or another court of appeals.[4]

2. Furthermore, the court of appeals was correct in deciding that a bright-line justification requirement is an unwarranted limit on the district court's discretion to reopen suppression hearings. As the court of appeals noted (Pet. App. 11a-13a), the stated justification for such a "good cause" bright-line rule is the interest in promoting judicial economy and preventing "piecemeal litigation." See *Dickerson*, 166 F.3d at 679. A related concern expressed by petitioner (Pet. 16-21) is that liti-

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[3] In so holding, *Thompson* relied on this Court's decision in *Steagald v. United States*, 451 U.S. 204, 209 (1981), which shows why petitioner is wrong in asserting (Pet. 22) that the court of appeals' decision conflicts with *Steagald*. Like *Thompson*, *Steagald* involved limitations on a party's right to assert an argument on appeal that was not argued —or was in fact conceded—in the lower courts. 451 U.S. at 211. Also like *Thompson*, *Steagald* does not address the question of a district court's discretion to reopen its own suppression hearing.

[4] Nor is petitioner correct in asserting (Pet. 21) that the decision below conflicts with various federal rules. As petitioner concedes, no federal rule addresses the decision to reopen suppression hearings, so the rules he cites do not conflict with the court of appeals' decision.

gants may attempt to "game the system" by presenting evidence in increments.

But reopening the proceedings does not necessarily unduly extend the proceedings. There may be other motions pending before the court requiring resolution that independently prolong the pretrial period. In any event, a totality of the circumstances approach allows the district court to take into account whether granting a motion to reopen would unnecessarily delay the case. As discussed (p 10, *supra*), courts of appeals have not hesitated to affirm a district court's refusal to reopen suppression hearings based on the moving party's lack of diligence or preparation. See *Carter*, 374 F.3d at 406; *Dickerson*, 166 F.3d at 679; see also *Hassan*, 83 F.3d at 696 (finding no abuse of discretion by the district court in denying government's motion to reopen suppression hearing because it had "ample time to prepare for the previous hearing") (citation omitted). Accordingly, a party has every incentive to introduce at the original suppression hearing all the evidence available to it that it believes necessary to prevail: failure to do so not only invites an adverse ruling, but also makes it exceedingly difficult for a party to prevail on any subsequent motion to reopen the proceedings.

On the other hand, as this Court and other courts have recognized, allowing a district court broad discretion to correct its own errors may likely serve to enhance judicial economy by conserving appellate resources. See *United States* v *Ibarra*, 502 U.S. 1, 5 (1991) (per curiam) (noting that motions for reconsideration provide district courts an opportunity to correct their own errors and "prevent[] unnecessary burdens being placed on the court of appeals"); *United States* v. *Healy*, 376 U.S. 75, 80 (1964) ("Of course speedy disposi-

tion of criminal cases is desirable, but to deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation."), *United States* v. *Rabb*, 752 F.2d 1320, 1323 (9th Cir. 1984) (noting that the totality of the circumstances approach "enables a district court to correct its own errors without the use of appellate resources"), cert. denied, 471 U.S. 1019 (1985), abrogated on other grounds, *Bourjaily* v. *United States*, 483 U.S. 171 (1987). Furthermore, as the court of appeals recognized, such an approach serves society's interest in admitting all relevant evidence in light of the fact that "a defendant is entitled to suppression only in cases of constitutional violations." Pet. App. 10a, 12a; accord *Rabb*, 752 F.2d at 1323.

3. Finally, review is unwarranted because even if there were a conflict among the courts of appeals on this question, this case would present a poor vehicle to resolve that conflict. That is because, contrary to petitioner's assertion (Pet. 18), he would not be entitled to relief under the bright-line rule he urges this Court to adopt As the court of appeals correctly observed, the government's request to reopen the suppression hearing was justified because the authenticity of petitioner's signature was not at issue until the suppression hearing. Pet. App. 13a.

Petitioner vaguely asserted in his initial motion to suppress that the cocaine in his tractor-trailer was obtained in violation of the Fourth Amendment. See Mot to Suppress (Oct. 3, 2004). In response, the government asserted that petitioner had consented to the search of his tractor-trailer The district court permitted petitioner to amend his motion to suppress, and he then spe-

cifically asserted that he did not consent to the search. See Mot. to Dismiss 14-15 (Jan. 12, 2005).

As is typically the case, the government reasonably expected that its production of the signed consent-to-search form at the suppression hearing would suffice to rebut petitioner's claim of lack of consent. It had no reason to think petitioner would claim that someone else had signed the form. Accordingly, when the district court granted petitioner's motion to suppress, partly on the ground that the signature on the consent-to-search form appeared different from petitioner's known signatures, the government acted reasonably in expeditiously submitting the signature to handwriting analysis. Then, after receiving the results, it was fully justified in seeking to reopen the hearing to allow for expert testimony on this score to ensure the accuracy of the district court's decision.

A contrary holding would effectively require the government to submit every signed consent-to-search form to handwriting and fingerprint analysis before a suppression hearing, in order to preemptively refute a possible forgery claim that might be raised for the first time at that hearing. Such a waste of resources should not be required by the judicially created rule petitioner advocates before this Court. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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